THE APPEALS COMMITTEE OF THE COUNCIL FOR MEDICAL SCHEMES

(Virtual Hearing)

(Instituted in terms of the Medical Schemes Act No.131 of 1998)

CMS NO: 80455

In the matter between:

Discovery Medical Scheme — Appellant

and

The Registrar — First Respondent

C obo S — Second Respondent

Quorum: Adv R.T. Mareume, Dr T. Mabeba, Dr S. Naidoo, Mr M. Maimane, Dr X. Ngobese

Date: 10 May 2023

RULING

A. INTRODUCTION

1. The Appellant is Discovery Health Medical Scheme ("Discovery" or the "Scheme"), a Medical Scheme duly registered and regulated under the Medical Schemes Act, Act 131 of 1998 (the "MSA").

2. The First Respondent is the Registrar of the Council for Medical Schemes as duly appointed in terms of section 18 of the MSA.

3. The Second Respondent is a Senior Case Manager and representative of Campaigning for Cancer, a Non-Government Organisation(NGO) acting on behalf of the member.

4. This is an appeal under section 48(1) of the MSA, providing that –

> *"(1) Any person who is aggrieved by any decision relating to the settlement of a complaint or dispute may appeal against such decision to the Council."*

5. Dr R accompanied by Ms M appeared for the Appellant.

6. The Third Respondent did not appear but indicated that the Registrar will abide by the Appeals Committee's decision.

7. Mr C accompanied by Dr D appeared for the Second Respondent.

8. The Appeals Committee heard the Appeal on 10 May 2023 *via* audio and video conferencing link.

B. BACKGROUND

9. Rev S joined the Appellant's medical scheme on 01 August 2018.
He is covered on the Coastal Core Plan. The plan provides the following:

9.1 Funding for the approved hospital claims at the contracted rate for treatment rendered in a network hospital.

9.2 Confirmed Prescribed Minimum Benefit (PMB) conditions would be funded in full should a member make use of the services of a Designated Service Provider (DSP) or meets the provisions of section 8 (3) of the Medical Schemes Act 131 of 1998.

9.3 Members have access to the schemes' Oncology Programme (OP) where approved treatments are funded up to a threshold limit of R 200 000,00 per beneficiary per 12 month cycle.

9.4 Further funding is available above the threshold limit at 80% of the Discovery Health Rate.

10. On 22 October 2021 registered with the scheme's Oncology Programme for *Malignant neoplasm* of prostate, ICD -10 Code C61. This is a Prescribed Minimum Benefit condition under condition 953L – cancer of prostate gland-treatable, for which stipulated treatment is Medical and Surgical Management including chemotherapy.

11. On 03 August 2022 and following disputed claims on whether there should be co-payment for Intensity Modulated Radiotheraphy (IMRT) treatment between the Appellant and the Second Respondent, the Second Respondent lodged a grievance against the Appellant to the First Respondent.

12. On 26 September 2022 the First Respondent referred the complaint to the Cinical Review Committee (CRC) for the opinion.

13. The Clinical Review Committee concluded as follows:

" C61 – Malignant neoplasm of the prostate is included in the PMB Regulations under the Diagnosis and Treatment Pair 953L- cancer of prostate gland – treatable.

According to the PMB Benefit Definition Guideline, Intensity Modulated Radiotherapy (IMRT) enables radiation oncologists to increase radiation doses homogeneously while maintaining safe tolerance doses to organs at risk.

Intensity-modulated radiotherapy (IMRT), with or without image guided radiotherapy (IGRT), is the gold standard for External Beam Radiation therapy (EBRT).

All 3 types of monotherapy radiation techniques are recommended as PMB level of care.

IMRT should thus be funded as PMB level of care without any co-payment."

14. On 11 November 2022, the First Respondent ruled on the basis of the CRC report that the scheme must fund IMRT in full without co-payment.

15. It is the said decision of the First Respondent that the Appellant is appealing against.

16. In its heads of argument contained at page 50 of the bundle, the Appellant argued that the First Respondent failed to consider the fact that IMRT was in this matter used as a component of trimodal therapy rather than as monotherapy (which is the prevailing level of care for the condition in issue).

17. Furthermore, the Appellant alluded that Mr S was treated with IMRT in combination with brachytherapy and hormone therapy. In their opinion, the Appellant emphasised that IMRT is only a PMB level of care when used as monotherapy.

18. The Appellant further argued that there is no clinical evidence that Mr S has attempted and exhausted other available Tier 1 treatments in the SADC guidelines. Furthermore, the Appellant said that it in the absence of evidence that the treatments in the protocol are ineffective or that it would cause an

adverse reaction, the requirement of Regulation 15H (c and 15I (c) have not been met.

19. The Appellant referred to Regulation 8 (5) of the Medical Schemes Act 131 of 1998 stipulating:

> " When a formulary includes a drug that is clinically appropriate and effective for the treatment of a Prescribed Minimum Benefit condition suffered by a beneficiary, and that beneficiary knowingly declines the formulary drug and opt for use of another drug instead, the scheme may impose a co-payment on the relevant member.

C. WHAT IS A PRESCRIBED MINIMUM BENEFIT?

20. Prescribed Minimum Benefit means the benefits contemplated in section 29 (1) (o) of the Medical Schemes Act 131 of 1998 and consists of the provision of the diagnosis, treatment and care costs of –

(a) the Diagnosis and Treatment Pairs listed in Annexure A, subject to any limitations specified in Annexure A; and

(b) any emergency medical condition[1].

21. Section 29 (1) (o) of the Medical Schemes Act[2] provides that the Registrar shall not register a medical scheme under section 24, and no medical scheme shall carry on any business unless provision is made in its rules for the scope and level of minimum benefits that are to be available to beneficiaries as may be prescribed.

22. Rule 8 (1) provides that subject to the provisions of this regulation, any benefit option that is offered by a medical scheme must pay in full, without co-payment or the use of deductibles, the diagnosis, treatment and care costs of the prescribed minimum benefit condition[3].

[1] Section 7 of Regulations in terms of the Medical Schemes Act 131 of 1998
[2] Act 131 of 1998
[3] *ibid*

23. Prescribed minimum benefit condition means a condition contemplated in the Diagnosis and Treatment Pairs listed in Annexure A or any emergency medical condition[4].

24. The explanatory note of Annexure A says that the objective of specifying a set of Prescribed Minimum Benefits within these regulations is two-fold:

    (i) To avoid incidents where individuals lose their medical scheme cover in the event of serious illness and the consequent risk of unfunded utilisation of public hospitals.

    (ii) To encourage improved efficiency in the allocation of Private and Public Health care resources[5].

D. LEGAL ANALYSIS

25. The relationship between a medical scheme on the one hand and its members on the other, is not governed solely by the scheme's rules but also by the obligations imposed by statute on the medical schemes[6].

26. The remarks of Lord Hailsham as appears in ***Johnson and another v Moreton***[7] bears pertinence to this matter:

> ***" It can no longer be treated as exiomatic that, in the absence of explicit language, the Courts would permit contracting out of the provisions of an act of Parliament, where that Act, though silent as to the possibility of contracting out, nevertheless is manifestily passed for the protection of a class of persons who do not negotiate from a position of equal strength, but in whose well-being there is a public as well as a private interest… It is precisely hisweakness as a negotiating party from which Parliament wish to protect him."***

[4] Section 7 of the Regulations in terms of the Medical Schemes Act 131 of 1998
[5] Medical Schemes Act 131 of 1998
[6] The Council for Medical Schemes v Genesis 2016 (1) SA 429 (SCA) at para [43]
[7] 1980 AC 37 (HL) See also The Council for Medical Schemes v Genesis, *ibid* at [42]

27. It is not in dispute that Mr S condition was a Prescribed Minimum Benefit (PMB) level of care. What is placed in dispute is whether Intensity Modulated Radiotherapy (IMRT) is the only PMB level of care when used as a monotherapy.

28. It is not clear as to which authorities did the Appellant rely upon to arrive at that conclusion that IMRT is a PMB treatment provided that it is used as a monotherapy. The Act is silent to regard this assertion. What can be confirmed from the Clinical Review Committee's report is that *malignant neoplasm* of the prostate is included in the PMB Regulations and that IMRT is one of the best suitable treatments.

29. Interpreting the Act beyond its ordinary words may lead to misinterpretation.

30. It is worrying to notice that the Appellant was expecting Mr S to have exhausted other available Tier 1 treatments in the SAOC guidelines before the use of IMRT. Firstly, this is due to the fact that Mr S was not the treating doctor and therefore he is a layman in connection to what had to be done to him. He therefore relied upon the knowledge, skill and expertise of his treating oncologist. Secondly, it is not the Appellant's version that they communicated with Mr S to inform his oncologist to refrain from using IMRT as a component of trimodal therapy otherwise that would according to the scheme's rules attract co-payment. Thirdly that IMRT is until reviewed by statute, a PMB level of care.

31. The law obliges medical schemes to pay for the treatment of PMB condition in full[8]. To conclude otherwise would be an infringement of the member's constitutional right to health care[9].

32. Regulations 15H (c) and 15I (c) of the Act[10] are irrelevant to the issue in dispute.

[8] Section 8 (1) of the Medical Schemes Act 131 of 1998, see also The Council for Medical Schemes v Genesis *ibid*

[9] Section 27 (1) of the Constitution of the Republic of South Africa, 1996

[10] Act 131 of 1998

E. FINDING

33. Having noted that the Appeals Committee's can overturn the decision of the First Respondent provided that there was an error or irregularity pertaining to its decision, the Committee could not find an error on the part of the First Respondent.

F. ORDER

34. Having considered the matter, the Appeals Committee rules that:
The Appeal is dismissed.

Adv R.T. MAREUME (For and on behalf of the Appeals Committee)

CONCURRING WITH-
Dr T. MABEBA

Dr S. NAIDOO

Mr M. MAIMANE

Dr X. NGOBESE